



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

Office of General Counsel
401 Church Street
20th Floor, L & C Tower
Nashville, TN 37243-1548
Telephone: (615) 532-0131
Facsimile: (615) 532-0145

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO. 7005 1160 0004 7332 4063

April 21, 2008

Ed Cole
Tennessee Department of Transportation
900 James K. Polk Bldg.,
505 Deadrick Street
Nashville, Tennessee 37243-0334

Re: Commissioner's Order, Case No. WPC07-0186
In the Matter of: Tennessee Department of Transportation and
Dement Construction Company

Dear Mr. Cole:

Enclosed please find an Order and Assessment issued by Commissioner James H. Fyke on behalf of the Tennessee Department of Environment and Conservation in the above referenced matter. Please read it carefully and pay special attention to the NOTICE OF RIGHTS section.

Sincerely,

A handwritten signature in black ink, appearing to read "Devin M. Wells", is written over a horizontal line.

Devin M. Wells
Assistant General Counsel

Enclosure

Cc: Columbia Field Office
Mark Jordan, WPC
Alfreda Freeman, EPA Water Management Division



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CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO. 7005 1160 0004 7332 4056

April 18, 2008

Edwin E. Wallis, Jr.
Registered Agent for Dement Construction Company
325 North Parkway
Jackson, Tennessee 38302

Re: Commissioner's Order, Case No. WPC07-0186
In the Matter of: Tennessee Department of Transportation and
Dement Construction Company

Dear Mr. Wallis:

Enclosed please find an Order and Assessment issued by Commissioner James H. Fyke on behalf of the Tennessee Department of Environment and Conservation in the above referenced matter. Please read it carefully and pay special attention to the NOTICE OF RIGHTS section.

Sincerely,

A handwritten signature in black ink, appearing to read "Devin M. Wells".

Devin M. Wells
Assistant General Counsel

Enclosure

Cc: Columbia Field Office
Mark Jordan, WPC
Alfreda Freeman, EPA Water Management Division

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
TENNESSEE DEPARTMENT OF)	
TRANSPORTATION and,)	CASE NO. WPC07-0186
DEMENT CONSTRUCTION)	
COMPANY)	
)	
RESPONDENTS)	

COMMISSIONER'S ORDER AND ASSESSMENT

NOW COMES James H. Fyke, Commissioner of the Tennessee Department of Environment and Conservation, and states:

PARTIES

I.

James H. Fyke is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "Commissioner" and the "Department" respectively).

II.

The Tennessee Department of Transportation ("Respondent TDOT"), is a department of state government organized under and existing by virtue of the laws of the State of Tennessee. Respondent TDOT is undertaking a project to widen SR-15 in Lawrence County, Tennessee ("the project"). Service of process may be made on

Respondent TDOT through Ed Cole, Tennessee Department of Transportation, 900 James K. Polk Bldg., 505 Deadrick Street, Nashville, Tennessee 37243-0334.

III.

Dement Construction Company ("Respondent Dement"), is an active corporation licensed to conduct business in the State of Tennessee and is contracted but Respondent TDOT to conduct construction activities at the site. Service of process may be made upon Respondent Dement through Edwin E. Wallis, Jr., Registered Agent, at 325 North Parkway, Jackson, Tennessee 38302.

JURISDICTION

IV.

Whenever the Commissioner has reason to believe that a violation of Tennessee Code Annotated ("T.C.A.") § 69-3-101 *et seq.*, the *Water Quality Control Act* ("Act"), has occurred, or is about to occur, the Commissioner may issue a complaint to the violator and may order that corrective action be taken, pursuant to T.C.A. § 69-3-109(a). Further, the Commissioner has the authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. § 69-3-115 of the Act and has the authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. § 69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated, pursuant to T.C.A. § 69-3-105, and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4.

V.

The Commissioner has been named by the Governor to act as trustee for the natural resources of Tennessee. Acting as trustee and pursuant to T.C.A. § 69-3-116, the Commissioner may assess damages to the State resulting from any person's pollution or violation, failure, or neglect in complying with any rules, regulations, or standards of water quality promulgated by the Tennessee Water Quality Control Board ("Board") or permits or orders issued pursuant to the Act. Damages may include any expenses incurred in the investigating and enforcing of this part, in removing, correcting, and terminating any pollution, and also compensation for any loss or destruction of wildlife, fish, or aquatic life and any other actual damages caused by the pollution or violation.

DEFINITIONS:

1. "Natural Resources" as used herein include all fish, wildlife, aquatic biota, waters and other such resources owned, managed, held in trust or otherwise controlled by the State.
2. "Natural Resource Damages" as used herein include all claims, arising from a discharge of pollution into waters of the state that occurred prior to the effective date of this Assessment, recoverable as natural resource damages under the Act and state common law. This includes the following:
 - a. The payment of compensation for the lost value of, injury to, or destruction of natural resources and natural resource services, including but not limited to the costs of assessments, attorney's fees, consultant's, or expert fees, interest, or any other expenses or costs; and
 - b. The restoration of injured natural resources and natural resource services.

VI.

The Respondents are "persons" as defined at T.C.A. § 69-3-103(20) and, as herein described, have violated the Act.

VII.

T.C.A. § 69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substance will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), a site specific Storm Water Pollution Prevention Plan (SWPPP) and appropriate fee.

VIII.

Choate Creek, North Fork Choate Creek and its unnamed tributaries herein described are "waters of the state", as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Board for suitable uses. Department Rule 1200-4-4, "Use Classifications for Surface Waters", is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, this water body has been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. In addition, North Fork Choate Creek is listed as Outstanding Tennessee Waters due to exceptional biological diversity.

FACTS

IX.

On June 7, 2006, the Division of Water Pollution Control (hereinafter "Division") received a NOI and SWPPP from Respondent TDOT requesting coverage under the TNCGP for the relocation and widening of SR-15 (US 64) in Giles and Lawrence Counties, Tennessee (hereinafter the "site"). The project consists of approximately 230 acres of disturbance. The NOI listed Respondent TDOT as the site owner/developer. No contractor information was provided on the NOI. The Division issued coverage under the TNCGP on June 28, 2006. On August 6, 2006, the Division received an amended NOI, which listed Respondent Dement as the primary contractor at the site.

X.

On June 19, 2007, the site experienced a rainfall event measuring approximately 2.38 inches. This rainfall event did not exceed the minimum design requirement to provide Erosion Prevention and Sediment Control (EPSC) measures necessary to retain sediment onsite during a 2-year, 24-hour storm.

XI.

On June 20, 2007, a post-rain EPSC inspection was conducted by personnel from Stantec, the consultant for TDOT, in conjunction with a Quality Assurance/Quality Control (QA/QC) inspection conducted by representatives of Civil and Environmental Engineering Consultants (CEC). The following observations and recommendations were made in the inspection reports:

- Outfall #18: The EPSC report and the QA/QC report both recommended the removal of silt from the rock berm/silt fence at this location.
- Outfall #19: The EPSC report recommended repair of the rock berm/silt fence in addition to the removal of sediment from this structure. The QA/QC report stated that sediment had left the Right of Way (ROW), but the EPSC report did not require removal of this silt.
- Outfall #20: The EPSC report recommended removal of sediment and repair of the rock berm/silt fence. The QA/QC report indicates that sediment has migrated off the ROW.
- Outfall #25: The EPSC report recommended the repair of the undercut silt fence, silt removal, and repair of rock the berm/silt fence. The QA/QC report indicates that sediment left the ROW.
- Outfall #26: The EPSC report and the QA/QC report both recommended the removal of sediment from the sediment trap.
- Outfall #29: Both reports noted the sediment release to North Fork Choate Creek, and requested sediment removal. Both reports noted that construction related sediment was spotted in North Fork Choate Creek both upstream and downstream of the Outfall #29 sediment release point.
- Outfall #46: The EPSC report and QA/QC report both recommended the removal of sediment from the rock berm/silt fence.

TDOT personnel notified the Department that evening of the sediment release to North Fork Choate Creek from Outfall #29 via email and requested permission to remove the accumulated sediment.

XII.

On June 21, 2007, Division personnel inspected the site and noted turbid water upstream of the reported release from Outfall #29 into North Fork Choate Creek. Division personnel determined the source of the turbid water to be a sediment release

from Outfall #18 into an unnamed tributary to North Fork Choate Creek. Division personnel noted that Outfall #18 was actively discharging muddy water into the unnamed tributary. Turbid water was noted flowing beneath and through a check dam and then beneath an un-trenched silt fence at this location. In addition, Division personnel noted a sediment release from Outfall #19 into a channel leading to a pond on adjacent private property. Heavy sediment deposits and turbid flow were noted in the unnamed tributary for its entire length beginning below Outfalls #18 and #19 and continuing to its confluence with North Fork Choate Creek. Sediment deposits and turbid flow were noted in North Fork Choate Creek to its confluence with Choate Creek and in Choate Creek from that confluence to Hurricane Creek Road, a distance of approximately 2 miles downstream from the confluence of the unnamed tributary with North Fork Choate Creek.

During a subsequent review of the June 20, 2007, EPSC inspection and QA/QC reports, Division personnel determined that neither the Respondents nor their consultants reported that sediment had reached the unnamed tributary to North Fork Choate Creek from any outfall except Outfall #29. Division personnel informed TDOT of the additional sediment releases noted during this inspection. The sediment releases noted by TDEC personnel, but not reported by TDOT personnel, or TDOT representatives, indicated a lack of oversight by TDOT personnel.

XIII.

On June 25, 2007, Division personnel met Respondents TDOT and Dement and personnel from Stantec and CEC at the site to discuss the additional sediment

releases and conduct a follow up inspection. Division personnel determined that the EPSC measures at Outfall #18 were not installed in accordance with the SWPPP. The SWPPP required a series of check dams in addition to a check dam installed with fabric filter and Class 57 stone. The EPSC measures noted during this inspection consisted of a single riprap check dam backed by un-trenched silt fence.

XIV.

On June 25-26, 2007, CEC personnel conducted a stream assessment of Choate Creek, North Fork Choate Creek, and the unnamed tributaries to North Fork Choate Creek. The summary report of this assessment indicated that, of the approximately 14,000 linear feet of stream channels below Outfalls #18, #19, #25, #26, and Bridge Crossing #1 that were assessed, 862 feet were designated as having moderate impacts from sediment deposition and 563 feet were designated as having severe impacts from sediment deposition. The severe impacts were confined to the unnamed tributaries downstream of Outfalls #18, #19, and #25. North Fork Choate Creek and Choate Creek showed varying levels of impact from sediment deposition.

XV.

On July 3, 2007, the Division requested additional information regarding Outfalls #20, 21, and 46 based on photographs contained in the June 20, 2007, QA/QC report.

XVI.

On July 12, 2007, Respondent TDOT personnel conducted a site inspection and sediment assessment. TDOT personnel noted a sediment release from Outfall #20 into an additional unnamed tributary of North Fork Choate Creek for a distance of approximately 60 feet. A sediment release from Outfall #46, which extended several hundred yards offsite, was also noted. This release did not impact waters of the state.

XVII.

On July 16, 2007, the Division issued Notices of Violation (NOV) to Respondent TDOT and Respondent Dement for the violations noted during the June 21, 2007, site visit. The Respondents were instructed to submit, within seven days, information required by the *General Permit for Sediment Removal for Stream Remediation*, along with a sediment removal plan and a description of the events that led to the sediment releases.

XVIII.

The discharge of sediment caused by the Respondents has injured the natural resources of the State of Tennessee and the services that they provide.

VIOLATIONS

XIX.

By failing to install and maintain adequate EPSC measures to control storm water runoff as required by the TNCGP, and by failing to document and report sediment

releases, as stated herein, the Respondents have violated T.C.A. § 69-3-108(b) and § 69-3-114(b):

T.C.A. § 69-3-108(b) states:

It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. § 69-3-114(b) states:

- (b) In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

XXI.

By causing a condition of pollution to Choate Creek, North Fork Choate Creek and its unnamed tributaries, as described herein, the Respondents have violated T.C.A. § 69-3-114(a):

T.C.A. § 69-3-114(a) states:

- (a) It shall be unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, causes any of the damages as defined in § 69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XVIII.

WHEREFORE, pursuant to the authority vested by T.C.A. §§ 69-3-109, 69-3-115 and 69-3-116, I, James H. Fyke, hereby issue the following ORDER AND ASSESSMENT to the Respondents.

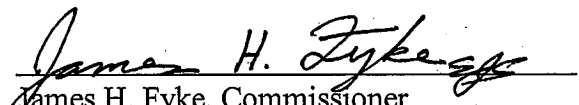
1. The Respondents are assessed a CIVIL PENALTY in the amount of FIFTY THOUSAND DOLLARS (\$50,000.00), which shall be paid to the Department within thirty (30) days from the receipt of this order.
2. The Respondents shall, within 30 days of receipt of this Order and Assessment, submit to the Division, a detailed description of the measures to be implemented to ensure accurate and timely discovery and reporting of sediment releases off site and/or to waters of the state.
3. The Respondents shall pay a NATURAL RESOURCES DAMAGE ASSESSMENT in the amount of THREE HUNDRED TWELVE THOUSAND SIX HUNDRED FIFTY-NINE DOLLARS AND FORTY CENTS (\$312,659.40).
4. The Respondents shall comply with the Act and Rules in the future.

The Director of the Water Pollution Control Division may, for good cause shown, extend the compliance dates contained within this ORDER. In order to be eligible for

this time extension, the Respondents shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay, the precise cause or causes of the delay, and all preventive measures taken to minimize the delay. Any such extension by the Division will be in writing. Should the Respondents fail to meet the requirement by the extended date, any associated Civil Penalty shall become due 30 days thereafter.

Further, the Respondents are advised that the foregoing ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the ORDER will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

Issued by the Commissioner of the Tennessee Department of Environment and Conservation on this 21st day of April, 2008.


James H. Zyke, Commissioner
Tennessee Department of Environment and
Conservation

NOTICE OF RIGHTS

Tennessee Code Annotated §§69-3-109 and 69-3-115, allow the Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the director at the address below a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment. If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization. It is the Department's position that corporations, limited partnerships,

limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the state of Tennessee.

At the conclusion of a hearing the Board has the authority to affirm or modify, or deny the Order and Assessment. This includes the authority to modify the penalty within the statutory confines (up to \$10,000 TEN THOUSAND DOLLARS per day per violation).

Furthermore, in the event the Board finds that the Respondent is responsible for the alleged violations after a hearing, the Board has the authority to assess additional damages incurred by the Department, including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of an administrative law judge and a court reporter.

Payments of the civil penalty shall be made payable to the Treasurer, State of Tennessee. All correspondence, including civil penalty payments or petition to appeal which is filed, should be addressed to Devin Wells, Assistant General Counsel, Office of General Counsel, Tennessee Department of Environment and Conservation, 401 Church Street, L&C Tower 20th Floor, Nashville, Tennessee 37243. Please write your case number, **WPC07-0127** on all payments and all correspondence concerning this matter.



Devin Wells
Assistant General Counsel
Tennessee Department of
Environment & Conservation
401 Church Street, L&C Tower 20th Floor
Nashville, Tennessee 37243-1548